SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1970

No. 280

SUPREME COURT, U.S.
FILED
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VINCENT H. CONBOY and other taxpayers of the City of Naples not named but made parties as members of a class,

Petitioners,

vs.

THE CITY OF NAPLES, a municipal corporation organized and existing under the laws of the State of Florida; BERT L. PINKSTON, as the Tax Assessor of and for the City of Naples and as the Tax Collector of and for the City of Naples; PORT ROYAL, INC., a Florida corporation; CHIEF PONTIAC MOTOR, INC., a Massachusetts corporation authorized to do business in the State of Florida and successor to Royal Palm Harbor, Inc., a merger Florida corporation; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND THE COURT OF APPEALS SECOND DISTRICT, STATE OF FLORIDA

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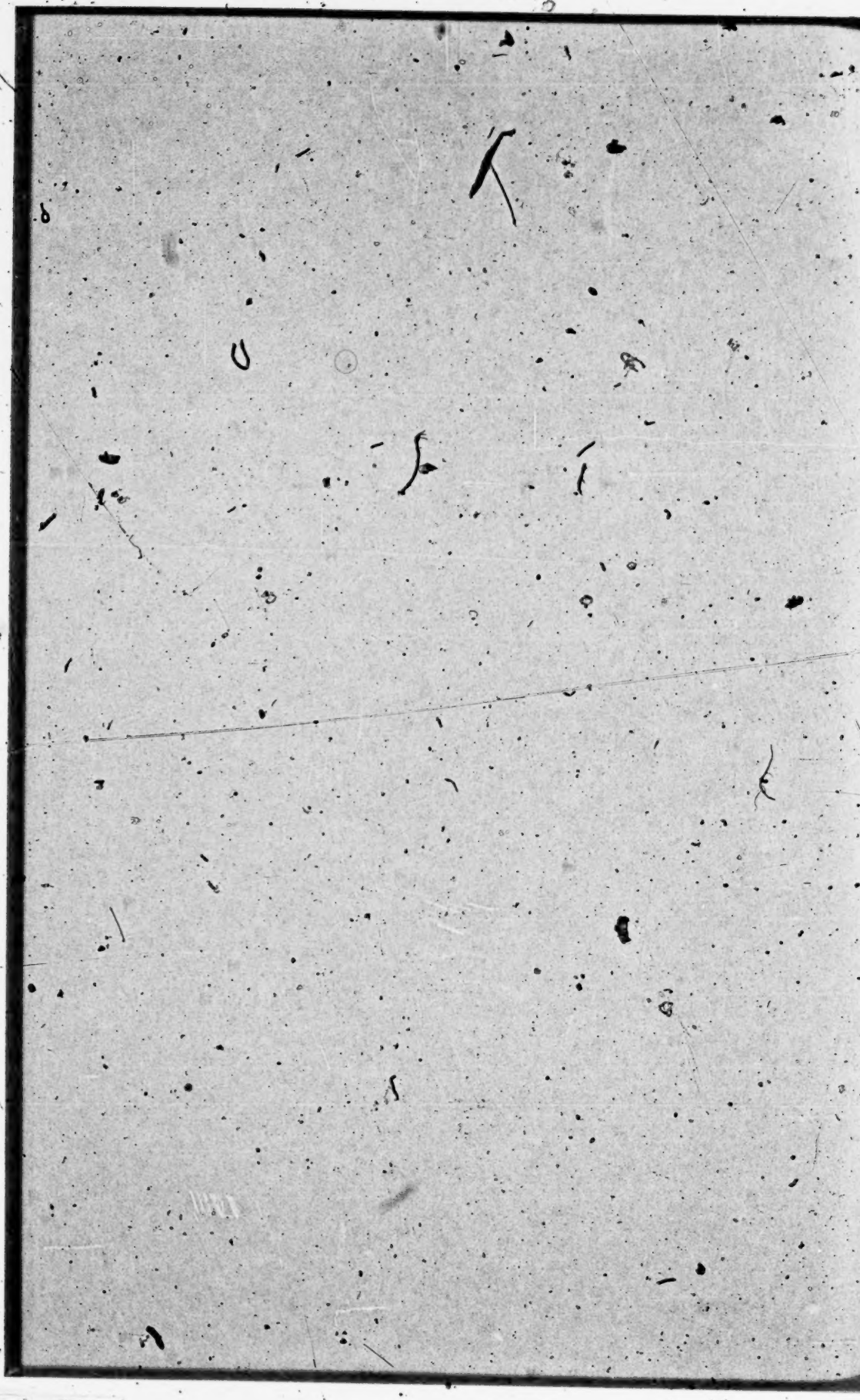

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The petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Florida entered on March 23rd, 1970, and of the District Court of Appeal of Florida, Second District, entered on the 14th day of January, 1970, in the above case.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 234 So. 2d 117. The opinion of the District Court of Appeal of Florida, Second District, is reported at 230 So. 2d 476.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and Rule 19 of the Supreme Court Rules in that in the Courts below there was drawn in question the validity of Florida Statutes Section 192.31(2) and 193.021, on the grounds of their being repugnant to Section 1 of Amendment 14 of the Constitution of the United States, and the decisions below were in favor of the validity of said Statutes. In addition, Petitioner alleges that the taxation of costs against him under the authority of Florida Statutes Section 90.231(2) as a Plaintiff in a taxpayer's class suit for the benefit of the general public is a violation of Amendment 1 and Section 1 of Amendment 14 of the Constitution of the United States.

QUESTIONS PRESENTED

Petitioner was the Plaintiff below in the Circuit Court in five taxpayer's class suits which were consolidated by the Court for trial. Each case contested the validity of portions of the tax roll of the City of Naples for a separate calendar year from 1962 through 1966. Petitioner named as Defendants the City and its Tax Assessor and named as additional Defendants certain land

developers who had purchased raw land, platted and developed it, and were selling individual lots to the general public.

Petitioner alleged and proved that the Tax Assessor first found full cash value of all lots in the subdivisions and then reduced to 25% of full cash value the assessments of lots still owned by the developer. Lots already sold by the developers and in the hands of purchasers were assessed at full cash value, as were all other properties in the City of Naples.

The Defendants did not contest the difference in the assessments. Instead the City and Tax Assessor alleged in the Answer to the 1966 case that the difference in the assessments was authorized by Florida Statutes Section 192.31(2).

Defendants also alleged in their Answer that under Florida Statutes Section 193.021 prescribing the method of assessment of property to "secure a just valuation" the Assessor was entitled to value the individual lots owned by developers on a "wholesale" basis at a figure which a prospective purchaser in bulk could be expected to pay for the property, while assessing other property owners, including builders who purchased from the developers, at a "retail" figure based upon sales prices of individual lots.

The trial Court ruled in favor of the Defendants and assessed $3,500.00 in costs against Petitioner and in favor of the developer Port Royal, Inc. for the claimed expenses of that developer's expert witnesses.

The District Court of Appeals, Second District of Florida, affirmed the Circuit Court and the Florida Supreme Court refused jurisdiction under a Petition for Writ of Certiorari.

The questions presented are:

1. Are State Statutes which permit a local Tax Assessor to assess a lot owned by a private individual at full cash value while assessing an immediately adjacent lot identical thereto at only 25% of full just value because it is owned by the initial real estate developer, repugnant to Section 1, Amendment 14, of the Constitution of the United States?

2. Is a State Statute permitting the taxation of costs in the amount of $3,500.00 against the Plaintiff in a suit brought by a taxpayer as a class action to test the validity of a method of real property assessments and the Statutes authorizing such assessments repugnant to Amendment 1 and Section 1, Amendment 14, of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent portions of the Constitutional provisions and Statutes involved are as follows:

"Amendment 14, Section 1, United States Constitution. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Amendment 1, United States Constitution. Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the government for a redress of grievances.

The pertinent parts of Florida Statutes Section 192.31(2) are as follows:

> "The Comptroller shall prepare a tentative manual of instructions for tax assessors, tax collectors and county boards of equalization and other tax officials, which . . . shall provide that platted land unsold as lots shall be valued for tax assessment purposes on the same basis as any unplatted acreage of similar character, until 60% of such lands included in one plat shall have been sold as individual lots."

Florida Statutes Section 193.021 is as follows:

> "The County assessor of taxes of the several counties shall assess all the real and personal property in said counties in such a manner as to secure a just valuation as required by Article IX, Section 1, of the state constitution. In arriving at a just valuation, the county assessors of taxes of the several counties shall take into consideration the following factors:
>
> (1) The present cash value of the property;
>
> (2) The highest and best use to which the property can be expected to be put in the immediate future; and the present use of the property.
>
> (3) The location of said property;
>
> (4) The quantity or size of said property;
>
> (5) The cost of said property and the present replacement value of any improvements thereon;

(6) The condition of said property;

(7) The income from said property; and

(8) The net proceeds of the sale of the property, as received by the seller, after deduction of all of the usual and reasonable fees and costs of the sale, including the costs and expenses of financing.

STATEMENT OF THE CASE

Petitioner was the Plaintiff below in the Circuit Court, the Appellant in the District Court of Appeal, and the Petitioner for Certiorari in the Florida Supreme Court. He owns property and is a resident of the City of Naples, Collier County, Florida. In each of the five years from 1962 through 1966 he filed a taxpayer's class suit contesting the validity of portions of the assessment roll of the City of Naples. Named as Defendants were four land developers, the City of Naples, and its Tax Assessor.

The suits originally challenged the validity of contracts between the City and the land developers under an Ordinance adopted by the City in 1954. This ordinance provided that land owners

> " . . . who desire to create subdivisions from lands composed generally of mangrove swamp, overflowed and other low lands . . . "

could enter in contracts with the City in which the City would agree

". . . to assess all lots in the subdivision, unimproved by physical buildings, to which title remains in the developer, whether it be a person, firm or corporation, as acreage until such time as sixty per cent of the lots have been sold, or the period of ten years has elapsed, whichever shall occur first . . ." (182 So. 2d 414)

The four developers owned such lands in the City. They entered into contracts with the City at various times prior to the institution of these suits and began bulkheading, filling and otherwise developing and subdividing the land and selling off individual lots. In accordance with their contracts and the ordinance the Tax Assessor continued to assess the lands as mangrove swamps even after the lands had been completely developed, were ready for sale as individual lots, and sales were being made.

The Circuit Court and the Florida Supreme Court held that the City was without authority to enter into such contracts (City of Naples vs. Conboy, Fla., 1965, 182 So. 2d 412). Both Courts directed the Assessor to reassess the lands for the years in question.

The Tax Assessor reassessed the properties in question for the years 1962 through 1965 and filed a Certificate of Compliance with the trial court. Petitioner believed that the reassessments and procedures used therein were improper and filed a Petition to Enforce the Final Decree in all four cases. Since the same assessment procedures were thereafter used by the City on the developer owned lands for the 1966 tax roll, Petitioner filed a fifth suit challenging that roll. The Court below consolidated all five cases for trial.

In their Answer in the 1966 case the City and Tax Assessor alleged as defenses for their low assessments of the developer

property the provisions of Florida Statutes Section 192.31(2) and 193.021. Plaintiff raised the Constitutional question as to these Statutes at the pretrial conference, but the Court ruled that it would apply these Statutes to the assessments.

At the trial Plaintiff called the Assessor as an adverse witness. He admitted that he first found 100% of the value of each lot in the subdivisions in question on the same basis of assessment as was used for other properties in the City of Naples. He then made a determination of the percentage of the lots sold in each subdivision. Where less than 60% of the lots were sold the Assessor then reduced the value of the unsold lots still owned by the original developer to 25% of the value of such lots, but he left the lots in each subdivision which had been sold by the developer at 100% of value. The Assessor then added the values of the developer owned lots in each subdivision and presented the bare totals to the Court – and to the City and the developers – as the total assessments on the various subdivisions (Record Pages 53-57, 352-358, Exhibit 14, Exhibit 16-19, Exhibit 23-24, Exhibit 27-32).

The effect of this method of appraisal upon the uniformity of assessments between land which the developer still owned on the one hand, and on the other hand, all other lands in the City, including lands which the developer had sold, can best be shown by the following compilation of a 10-lot segment of Port Royal, Galleon Drive subdivision (the facts and figures are taken from Exhibit 19).

		1962		1963	
Lot No.	Full Value	Ownership	Assessment	Ownership	Assessment
121	12,400	Developer	3,100	Developer	3,100
122	12,600	Private	12,600	Private	12,600
123	13,500	Private	13,500	Private	13,500
124	18,400	Private	18,400	Private	18,400
125	16,400	Developer	4,100	Private	16,400
126	12,900	Private	12,900	Private	12,900
127	11,900	Developer	2,980	Private	11,900
128	12,550	Private	12,550	Private	12,550
129	12,800	Developer	3,200	Developer	3,200
130	14,400	Developer	3,600	Private	14,400

The Assessor claimed that once 60% or more of the lots has been sold in any given subdivision, he assessed all of the lots, including those owned by the developer, at full value in order to comply with Section 192.31(2) Florida Statutes. The evidence showed that the Assessor had, however, miscalculated on the number of lots sold in various subdivisions in 1962, 1963 and 1965 giving rise to a loss to the City of $6,776.40. The Assessor also left many lots completely off the tax roll (Exhibits 16, 18, 19, 23, 29 and 33, Record Pages 368-371, 413-418).

Plaintiff, who is a qualified appraiser, also testified as to his appraisal estimate of the value of lands owned by developers in the subdivisions in question (Pages 428-489, Exhibits 38-48 inclusive), which were considerably higher than the appraisals of the Assessor.

Despite this evidence, the Court granted the Motions for Dismissal made at the close of Plaintiff's case by the City and the Assessor insofar as the allegations of improper methods of valuation were concerned. The Court retained jurisdiction only to determine whether more than 60% of the lots had been sold in the years in question in the various subdivisions. At that time, Plaintiff reiterated his argument, made at the pre-trial conference that Florida Statutes 192.31(2) was unconstitutional, but the Court rejected this (Record Page 496).

The Defendant, Port Royal, Inc., announced that it would introduce testimony to show that the developer lands should be valued on a wholesale basis even after 60% of the lots had been sold. It then presented the testimony of three appraisers who testified about a method used in discounting developer owned lots which was variously characterized as the income approach (Record Page 176) or the land residual approach (Record Pages 190-191). In this method, the net profit on sales of land over a long period of time is estimated. This figure is then treated like an annuity and reduced to a present value using an arbitrary rate of return.

Although the appraisers agreed that the factors used in this method vary from year to year and from subdivision to subdivision (Record Pages 214-232), the formula was used without change by the Assessor for all of the subdivisions of the Defendant developers for all five years. It was not used on any other land in the City of Naples. Even using this method, the value placed on the property as of January 1, 1966 by the appraisers

was up to $700,000.00 more than the assessment figures for the years 1962 to 1965.

Plaintiff offered as a rebuttal witness an appraiser, THEODORE C. SLACK, who testified that using such a method exclusively for developers was unfair to the individual owners who would have greater handicaps, difficulties and disabilities in attempting to sell individual lots than would the developer of many lots (Record Pages 257-259).

At the close of all of the evidence Petitioner again raised the Constitutional questions. Notwithstanding this the Court entered a Final Judgment in favor of all of the Defendants and against the Petitioner.

Thereafter the Defendants moved to tax costs against Plaintiff and the Court entered an order taxing costs of $3,500.00 against the Plaintiff in favor of the developer Port Royal, Inc.

Petitioner appealed on the Constitutional issues to the Florida Supreme Court, which remanded the case to the District Court of Appeal of Florida, Second District. This Court ruled against Petitioner on January 14, 1970. In accordance with the Rule set down by this Court in Stratton vs. Stratton, 239 U.S. 55, 36 S.Ct. 26, 60 L.Ed. 142, Petitioner filed his Petition for Writ of Certiorari with The Florida Supreme Court in order to exhaust his state remedies; even though the jurisdiction of the Florida Supreme Court was discretionary (Andrew v. Virginian R. Co. 248 U.S. 272, 39 S.Ct. 101, 63 L.Ed. 236). The Florida Supreme Court refused jurisdiction on March 23, 1970 and Petitioner thereafter filed this Petition (American Railway Express Co. vs. Levee, 263 U.S. 19, 44 S.Ct. 11, 68 L.Ed. 140).

REASONS FOR GRANTING THE WRIT

The decisions below should be reviewed because the State courts have decided the Federal questions of the equal protection of the laws, due process, and freedom of speech and petition for redress of grievances which are raised by the facts in the case at bar in a way probably not in accord with the applicable decisions of this Court.

QUESTION ONE

Are State Statutes which permit a local Tax Assessor to assess a lot owned by a private individual at full cash value while assessing an immediately adjacent lot identical thereto at only 25% of full just value because it is owned by the initial real estate developer, repugnant to Section 1, Amendment 14, of the Constitution of the United States?

The difference in the assessment techniques used by the City and the Tax Assessor to value Petitioner's land and the techniques used to value the lots of the developers violates the equal protection clause of the 14th Amendment and the refusal of the Courts below to grant relief violates the due process clause of the 14th Amendment of the United States Constitution.

The facts in the case at bar are the mirror image of the facts in the case of Sioux City Bridge Co. v. Dakota County 1923, 260 U.S. 441, 67 L.Ed. 340, 43 S.Ct. 190, 28 A.L.R. 979. There the Bridge Company's land was assessed at 100% of value and all other property was assessed at 55% of value. Here all property is assessed at 100% of value except that owned by the developers, which is assessed at 25% of value. There is no difference in the land itself. Lots lying side by side and which are otherwise identical are assessed at different values solely on the basis of the ownership of the lots.

In the Bridge Company Case this Court said:

> "The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination; whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional, systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property . . . (28 A.L.R. at 982).
>
> "(W)here it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." (28 A.L.R. at 983)

The inequality is even more unjust than appears at first glance. As pointed out by Petitioner's witness THEODORE C. SLACK:

> "Generally the individual lot owner is in a competitive disadvantage to the developer because of the fact that the developer does extensive advertising, has a sales staff, sales organization, promotional literature, which in many cases goes throughout the United States; whereas the individual lot owner has to put up his own sign and does his own advertising.
>
> "In other words, he enters into a one man campaign to merchandise one lot, and he can offer this lot and no others to the market; whereas the developer can offer any of several dozen or perhaps several hundred to a much larger group of people, and the amount of money that he

spends proportionate to his investment might be the same, but the percentage of the market which the developer reaches has got to be much larger than the percentage that the individual lot owner reaches . . .

"In several cases, in my personal experience, the individual lot owner has not been able to realize as much as he paid for the property when he offers it on the market for sale."

"Q. Would the return of the individual owner be as great as that of the developer, the return on his investment?

"A. No, because the individual buyer has purchased at the market price which the developer did not do."
(Record Pages 257 to 259)

Furthermore, the discount is available only to the original subdivider of a large tract of land. An investor who bought several lots from the subdivider or an investor who owned several lots throughout the City would not be entitled to a subdivider's discount, although his position would be analagous to that of a subdivider.

Finally, discount amounts to a tax subsidy for those who are despoiling the ecology of Florida. The case at bar is a flagrant example of this. The developers destroyed mangrove swamps which are the breeding grounds for many of the fish living in Florida waters. Elsewhere in the state developers are ripping up key portions of the Everglades and other vital ecological areas in order to sell lots at inflated prices through high pressure tactics. Florida's taxpayers are unknowingly subsidizing these operations.

The burden of this tax subsidy is really borne by the school children of Florida and those in need of local governmental welfare and other services. A paper entitled "Property Taxation in Florida" prepared by the Florida Legislative Reference Bureau for the 1967 session of the Florida Legislature pointed out that the property tax raised more than twice as much revenue as the then – 3% sales tax, and that school levies amounted to more than 45% of all property taxes in 1965. The principal source of funds for Florida schools is the property tax.

Since then the needs of the school systems for funds have been increased by the added expenses of providing integrated, unitary school systems within local districts. At the same time the ability of school districts to raise these funds has been decreased by a millage ceiling imposed by the 1968 revision of Florida's Constitution (Article VII, Section 9(b)) and Chapter 67-395, Laws of Florida, 1967 (Florida Statutes 1969, Section 193.321-193.327). Collier County School Board Chairman, Dr. Bruce Boynton, was quoted in the Fort Myers News-Press, Page 1, Section D, Friday, March 20, 1970, as saying, "Schools are going to be in desperate trouble next year. As things stand now there's no way we can operate the schools next year."

Full assessments on every parcel of property are needed now even more than in 1962-1966. The precedent of this case blocks full assessments.

The methods used by the tax assessor and the City of Naples in valuing the developers' land constitutes an invidious discrimination against Petitioner and the property owners of the class to which he belongs, namely, the remaining property owners in the City of Naples, and is contrary to the equal protection clause of the 14th Amendment.

The failure of the Court below to grant Petitioner any relief violates the due process of law clause of the 14th Amendment. In the Sioux City Bridge Case this Court held that the ruling of the Nebraska Supreme Court that

> " . . . the Bridge Company has no remedy except 'to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced'" (28 A.L.R. at 982)

was in effect a denial of due process to the Bridge Company since it

> " . . . is to deny the injured taxpayer any remedy at all, because it is utterly impossible for him, by any judicial proceeding, to secure an increase in the assessment of the great mass of underassessed property in the taxing district." (28 A.L.R. at 983)

While the case at bar involves the reverse situation the same legal principles should apply. The developers' lots are proportionately only a small fraction of the total number of assessed parcels in the City of Naples. All of the other parcels are conceded to be assessed at 100% of value. The Assessor has found 100% of value for the developers' lots and then taken the additional step of reducing all developer lots to 25% of value. It is far easier to direct the Assessor to eliminate this last step as to the developers, and to return their lots to full assessed value, than it would be to require the Assessor to reduce all of the remaining property in the City of Naples at 25% of value.

Therefore, in denying the Petitioner any relief the Courts below have denied him due process of law in violation of the 14th Amendment to the Constitution of the United States.

QUESTION TWO

Is a State Statute permitting the taxation of costs in the amount of $3,500.00 against the Plaintiff in a suit brought by a taxpayer as a class action to test the validity of a method of real property assessments and the Statutes authorizing such assessments repugnant to Amendment 1 and Section 1, Amendment 14, of the Constitution of the United States?

Plaintiff brought this action as a taxpayer's class suit to compel the City and Assessor to make a full and complete assessment of the property of the developer Defendants (Port Royal, Inc. et al vs. Conboy, Fla. App., 154 So. 2d 734). Other than the miniscule benefit Plaintiff would receive as a taxpayer of the City of Naples, he could not and did not expect to gain anything of value from this litigation.

Petitioner's initial efforts brought about an increase in assessed valuations of almost $5,000,000.00 and brought increased tax revenue to the City of more than $60,000.00 for the years in question, with added revenues expected for future years. (Record, Page 53 to 57) Since the Assessor admits that the present assessments, including the increase, are at only 25% of value, (Record, Page 352, 509; Exhibits 16 to 19, 23 to 24, 27 to 32) then had Petitioner been successful in the Court below in the present action, the recovery of the City would have been more than four times as great for the years in question and even greater in the years to come.

Instead of applauding his efforts, the Courts below have penalized him by the taxation of costs in the amount of $3,500.00. I believe that this Court can take judicial notice of the fact that this is not a sum which the average taxpayer can lightly afford.

A taxpayer's suit against public officials is both a means of expressing dissent from the policies adopted by those officials and a form of petition for redress against grievances under the First Amendment to the United States Constitution. The taxation of excessive costs in such cases constitutes an effective sanction against such methods of free speech and right of petition.

This Court has held that First Amendment

> ". . . freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." NAACP vs. Button 371 U.S. 415, 433; 83 S.Ct. 328, 338; 9 L.Ed. 2d 405.

In that case the sanctions involved the threat of disciplinary proceedings against lawyers and actions against those who referred cases to them. In the case of Dombrowski vs. Pfister, 380 U.S. 479 at 487, 85 S.Ct. 1116 at 1121, 14 L.Ed. 2d 22, the sanctions concerned threatened prosecutions for violations of a state Subversive Activities Law and Communist Propaganda Control Law. This Court stated that:

> "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to broad overregulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser . . .
>
> "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."

The prospect of the imposition of burdensome Court costs upon a lonely taxpayer fighting what he believes to be illegal acts on the part of public officials can only have a chilling effect upon this method of free expression and petition for redress of grievances. The loser will be society in general, just as the real loser in the case at bar is the taxpaying public of the City of Naples, which gained $60,000.00 from Mr. Conboy's initial efforts but will hardly gain any more if their public officials are allowed to revert to their old patterns of conduct, secure in the knowledge that the Collier County Circuit Court has effectively deterred any judicial interference with their activities under the authority of Florida Statutes Section 90.231(2).

Although this matter was one of first impression in Florida it has been held elsewhere that when a taxpayer files a suit for the benefit of the general public in good faith, and is not successful, taxable costs should not be charged against him (Leonard vs. School Committee, 1922, 241 Mass. 325, 135 N.E. 459; Howard v. City of Chicopee, 1938, 299 Mass. 115, 12 N.E. 2d 106).

The imposition of such costs in the case at bar is particularly unjust. Until this suit the Assessor was purportedly applying the 60% rule of Florida Statutes Section 192.31(2). When 60% of the lots were sold by the developer the Assessor then put the remaining developer lots on the assessment roll at full value. Port Royal, Inc. was successful in persuading the Court that under the authority of Florida Statutes Section 193.021 the 60% rule should be overlooked and the developers' discount continued until all developer lots were sold. Since Port Royal had sold out more than 60% of the lots in certain subdivisions the net effect of this decision was to give Port Royal an immediate tax reduction.

The rule in Florida is that a taxpayer is not entitled to recover his costs, including the costs of expert witnesses, in a tax abatement proceeding (Palethope vs. Tompson, 1965, 171 So. 2d 526 at 533 and cases cited thereat). Thus, had Port Royal filed suit to make a direct challenge of the 60% rule it would not have been able to recoyer costs in any amount. By taking advantage of Petitioner's suit Port Royal has not only defended itself from an increase in its taxes, but has obtained the added benefit of a reduction of its taxes with an otherwise illegal sweetner of the payment of its costs and expenses of litigation by Petitioner. The irony as well as the injustice of this result is obvious. So is the unconstitutionality of what was done by Florida's Courts.

CONCLUSION

The basic facts in this case are not in dispute. The Assessor first determined 100% of value for each lot in the subdivisions in question. He then determined which lots were still owned by the original subdivider and reduced the assessments of those lots to 25% of value. The remaining lots in the subdivision and in the rest of the City of Naples were left at 100% of value. The result was the incongruous spectacle of identical lots, lying side by side, and having an identical value, being assessed at different values depending solely on the status of the persons owning the lots.

This is a flagrant denial of the equal protection clause of the 14th Amendment to The United States Constitution.

The failure of the Court below to grant relief to the taxpayers of the City of Naples through this class suit by refusing to require the Tax Assessor to eliminate his developer discount reductions constitutes a denial of due process of law under the 14th Amendment to the United States Constitution.

Finally, taxing costs against a taxpayer who has brought a suit to benefit the public and not himself has a chilling effect upon the exercise of the rights of freedom of expression and petition for redress of grievances preserved in the First Amendment to the Constitution of the United States.

For the reasons set forth hereinabove it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

ROBERT M. BRAKE
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APPENDIX

(CAPTION OMITTED)

FINAL JUDGMENT

The five above numbered actions involving the same parties and common questions of law and fact have been duly consolidated. Such consolidated litigation came on regularly for trial, pursuant to pre-trial conference and pre-trial order, upon the issues made by plaintiffs' petition to enforce final decree and amendment thereto, certificate of compliance with final decree filed by the defendant tax assessor, and the complaint and answers filed in case numbered 2674. The Court has heard the testimony, reviewed the evidentiary exhibits, and considered the various briefs submitted.

This litigation was instituted on August 16, 1962. A final decree was entered on September 4, 1964. On appeal, the final decree was affirmed by decision of the Supreme Court of Florida reported in City of Naples v. Conboy (Fla. 1965), 182 So. 2d 412.

The previous decision in this case invalidated assessments of the lands involved herein for the reason that such assessments were made under guidelines and standard measures of value prescribed by municipal ordinances and contracts declared to be ultra vires and void. The taxing officials of the City of Naples erroneously utilized unauthorized and illegal criteria for the evaluation of said lands for municipal tax purposes. This invalidated the assessments. The final decree directed the taxing authorities of the City of Naples to reassess the lands involved. A complete reassessment of the lands was made upon the basis of a report and recommendations submitted by Hunnicutt & Associates, Inc., an appraisal company employed by the City of Naples. After equalization hearings on the substantially increased valuations arrived at under the reassessment program,

additional municipal taxes on the subject lands were levied and collected.

This consolidated litigation now is before the Court for supplemental adjudication of the question whether the revised assessed valuations of the lands accomplished under the reassessment program of the City of Naples conform to the requirements of law.

There is no uncertainty concerning the fundamental requirements of law governing ad valorem tax assessments. The controlling provisions of the Florida Constitution (Article IX, Sections 1 and 5) and the implementing statutory provisions have been construed and applied by the Courts. The Legislature is constitutionally mandated to provide for a uniform and equal rate of taxation and to prescribe such regulations as shall secure a just valuation of all property. The judicial decisions beginning in 1942, with Schleman v. Connecticut General Life Insurance Co., 151 Fla. 96, 9 So. 2d 195, and followed more recently by the decisions in State ex rel. Glynn v. McNayr (Fla. 1961), 133 So. 2d 312, and McNayr v. State ex rel. DuPont Plaza (Fla. 1964), 166 So. 2d 142, indicate that ad valorem tax assessments shall be made uniformly and equally at just valuation or full value. The 1965 decision of the Supreme Court in Walter v. Schuler (Fla. 1965), 176 So. 2d 81, reaffirms that assessments at less than 100 percent of just valuation are illegal, and clearly establishes the controlling principle that "just valuation" and "fair market value" may be established by the classic formula that it is the amount a purchaser, willing but not obligated to buy, would pay to one willing but not obligated to sell.

The particular real property involved in this consolidated litigation consists of vacant, platted lands remaining unsold as individual lots in residential subdivisions owned and developed by the defendant subdividers named in the caption thereof. It

is undisputed that such lands are squarely within the purview of the classification prescribed by Section 192.31(2), Florida Statutes, wherein it is provided:

> " . . . That platted lands unsold as lots shall be valued for tax assessment purposes on the same basis as any unplatted acreage of similar character, until sixty percent of such lands included in one plat shall have been sold as individual lots . . . "

This legislative directive requires that the remaining unsold lots included in a single platted subdivision shall be valued for tax assessment purposes on the same basis as unplatted acreage of similar character, until such time as sixty percent of all the lots have been sold. Such statutory guide indicates that unsold lots in a platted subdivision which are still owned by the subdivider (and offered for sale as individual lots) are to be valued for tax assessment purposes as a single parcel of land. The valuation of the whole group of unsold lots is to be made on the basis of unplatted acreage of similar character. The land consisting of unsold lots in a platted subdivision is assessed in the same manner as unplatted acreage of similar character. When the subdivider has sold sixty percent of all the lots in the platted subdivision this method of assessment terminates.

In accord with the rationale of the decisions in Lanier v. Overstreet (Fla. 1965), 175 So. 2d 521, and Markham v. Blount (Fla. 1965), 175 So. 2d 526, and the application thereof in the cases of Matheson v. Elcook (3rd D.C.A. Fla. 1965), 173 So. 2d 164, cert. denied, Elcook v. Matheson (Fla. 1966), 184 So. 2d 889; Stiles v. Brown (1st D.C.A. Fla. 1965), 177 So. 2d 672, cert. denied, Stiles v. Brown (Fla. 1966), 182 So. 2d 612, and Brown v. St. Joe Paper Company (1st D.C.A. Fla. 1965), 178

So. 2d 606, cert. denied 184 So. 2d 886, the pretrial order entered without objection in this consolidated litigation determined that the provisions of Section 192.31(2), Florida Statutes, are applicable and controlling in respect to the assessments of the unsold platted lands involved herein.

The plaintiff, Vincent H. Conboy, challenges the validity of the revised assessed valuations of said lands arrived at under the reassessment program, and urges that the Court again direct the taxing authorities of the City of Naples to reassess the lands. The plaintiff alleges that, notwithstanding the final decree, the City taxing authorities intentionally, arbitrarily and systematically undervalued the lands by granting an unauthorized and illegal subdivider's discount. It is noteworthy that the plaintiff made the same attack on the Collier County assessments of the same classification of lands. See State ex rel. Conboy v. Colding (2nd D.C.A. Fla. 1967), 200 So. 2d 246, certiorari denied 204 So. 2d 331 (Fla. 1967), wherein the Court held that:

> "The granting of an illegal subdivider's discount to the owners of unsold, vacant, platted lands is the basis of appellant's third contention. It appears that the tax assessor applied the statutory classification and requirements of Sec. 192.31(2), Fla. Stats., F.S.A., in placing a value on unsold platted lots on the same basis of acreage of similar character. To have done otherwise would have been contrary to Sec. 192.31(2), Fla. Stats., F.S.A., and mandamus will not be granted to compel the performance of an illegal act. State ex rel. Glynn v. McNary, supra."

In Lanier v. Overstreet (Fla. 1965), 175 So. 2d 521, the Supreme Court, in holding that Sec. 193.11(3) is a valid legislative classification designed to secure a just valuation of agricultural lands, said that:

"Another legislative directive providing a practical guide to assure that the land will be assessed in accordance with its actual character during the tax year is found in Section 192.31(2), Fla. Stat., F.S.A., requiring platted lands to be assessed on the same basis as unplatted lands until 60 percent of the lands in one plat have been sold as individual lots."

The Florida Tax Assessor's Guide, authorized by Section 192.31, Florida Statutes, and approved by the Florida Budget Commission, at Page 93(d), provides:

"SUBDIVISION LOTS. Section 192.31, Florida Statutes, provides that platted lands, unsold as lots shall be valued for tax assessment purposes on the same basis as unplatted acreage of similar character, until sixty per cent of such lands included in one plat shall have been sold as individual lots. This does not apply, however, to lots in the same subdivision which have been sold to individuals. These should be valued as platted lands and carried on the rolls as individual lots for assessment purposes. O.A.G. 056-190, 7-2-56."

The jurisdiction of the Court in ad valorem tax matters is delineated by the provisions of Article V, Section 6(3), Florida Statutes, and Section 196.01, Florida Statutes. The scope of judicial inquiry is the legality of the tax or assessment. In the absence of a showing of illegality, the Court is not justified in striking down tax assessments made by the appropriate tax officials, or substituting judicial judgment for the administrative judgment of the tax officials. It is not the function of the Court to supervise the making of tax assessments, or to resolve differences of opinion as to the precise sums at which taxable property should be assessed. Mere errors in judgment made in good faith do not constitute a sufficient basis for judicial intervention. The

acts of tax officials are clothed with a presumption of bona fides and correctness. To overcome the presumption, there must be evidence of an intentional, systematic or planned deviation from proper assessing methods, techniques and procedures without regard to actual values, or evidence of some unlawful act on the part of the tax officials. Walfield, Inc. v. Sproul (1966), 26 Fla. Supp. 193. As stated by the Court in Harbond, Inc. v. Anderson (2nd D.C.A. Fla. 1961), 134 So. 2d 816:

> " . . . the making of valuations upon property for tax purposes is an administrative act involving exercise of administrative discretion; and the good faith of tax officers and their official actions is presumed. When made by proper officers, the prima facie correctness of an assessment, to be overcome, must be affirmatively assailed by appropriate and sufficient allegations and proofs, to the exclusion of every reasonable hypothesis of legal assessment. (cases cited) Tax assessors are necessarily accorded a wide discretion in valuation of property for taxation purposes, and conflicting views frequently arise in the common effort to arrive at such a valuation. Courts will not ordinarily disturb an assessment made by a tax assessor or control his reasonable discretion in making an evaluation of property for assessment purposes. (cases cited)"

On the second trial of this case the plaintiff has wholly failed to prove there was an intentional, arbitrary and systematic undervaluation of said lands by the City taxing authorities. On the contrary, the Court finds that the revised assessed valuations accomplished under the reassessment program were made at just valuation, in that such assessed valuations either equal or exceed the fair market value of the lands involved. For example, the fair market value of the lands owned by the defendant, Port Royal, Inc., on January 1, 1966, did not exceed the sum of

$1,491,000.00, as established by a preponderance of the evidence, while the 1966 reassessment valuation thereof made by the City taxing authorities was 112 percent of fair market value.

The City of Naples, pursuant to the final decree of this Court and the mandate of the Supreme Court of Florida, proceeded in good faith to make a reassessment of the lands involved. The City was under a legal duty to assess uniformly and equally at just valuation, in the manner prescribed by law. Acting on the advice and recommendations of Hunnicutt & Associates, Inc., the City assessed the unsold platted lands owned by the defendant subdividers on the basis of the evaluation guidelines prescribed by Section 192.31(2), Florida Statutes. It is undisputed that the assessments of all the lands were made uniformly and equally. The fundamental issue simply is whether or not the lands involved were assessed at just valuation or fair market value.

The plaintiff initially objected to the assessments on the ground that the method of assessment utilized by the City unlawfully granted a "subdivider's discount", and that the assessed valuations represented only a percentage of the true value of the lands involved. Plaintiff asserted that the unsold platted lands should be assessed, not on the basis of unplatted acreage of similar character, but at substantially the same amount as the sales prices received for lots sold to individual purchasers. This, of course, is contrary to the legislative directive embodied in Section 192.31(2), Florida Statutes.

The plaintiff now contends that Section 192.31(2), Florida Statutes, is not applicable to the unsold platted lands involved herein and the City of Naples is not authorized to make assessments in accordance with such statutory requirements, because the provisions of the Charter of Naples governing tax assessments supersede the general law, and the Charter provides that:

". . . Assessments shall be on a basis not in excess of fair cash value. The term 'fair cash value' is defined to mean the price at which the property would sell if voluntarily offered for sale by the owner thereof upon such terms as like property is usually sold, not at the price which might be realized if sold at a forced sale."

The plaintiff further claims that in some instances more than sixty percent of the lots included in certain sections or segments of the various platted subdivisions have been sold; and that, therefore, the assessments made under and pursuant to the provisions of Section 192.31(2), Florida Statutes, are wholly invalid.

Finally, plaintiff contends that the pertinent provisions of Section 192.31(2), Florida Statutes, are void and unconstitutional.

The Court is inclined to the view that the contentions made by plaintiff are without merit. However, by reason of the evidence presented at the trial of this consolidated litigation it becomes unnecessary to render an opinion or to decide these questions in arriving at a proper decision in this case. This is so, because the evidence shows that, irrespective of the manner or method in which such assessments were made, and regardless of whether Section 192.31(2), Florida Statutes, is applicable or inapplicable, the lands owned by the defendant subdividers have been valued for tax assessment purposes to the full extent of their fair market value, as established by recognized and accepted appraisal methods, techniques and procedures employed by competent and qualified real estate appraisers to ascertain the fair market value of property of the nature and character here involved, without consideration of the provisions of Section 192.31(2), Florida Statutes.

At the trial, the defendant property owners produced qualified and experienced real estate appraisers, who had made formal written appraisals of the lands involved herein, and who testified as to the fair market value of such lands and submitted documentary evidence in support of their estimates of fair market value.

In rebuttal, the plaintiff offered the testimony of a qualified real estate appraiser, as well as his own opinion concerning fair market value. The expert witness called by plaintiff stated that he adopted and used all the data and figures compiled by defendants' first appraisal witness, except the period of time required to sell the remaining subdivision lots. The process by which plaintiff arrived at his estimate of fair market value has been specifically condemned by the appellate court in McNayr v. Claughton (3rd D.C.A. Fla. 1967), 198 So. 2d 366.

While the real estate appraisers on each side were not in agreement as to the sum constituting fair market value, there was no disagreement concerning the proper method of appraisal or appraisal approach utilized for arriving at the fair market value of the particular type of property here involved. All were in accord that the income or economic approach constitutes the most sound and reliable method to ascertain the fair market value of income producing property of the nature and character here under consideration. The defendants' appraisers also utilized the market data or comparable sales approach as a guide to determine fair market value. The defendants' first appraisal witness also took into consideration the factors enumerated in Section 193.021, Florida Statutes.

In City of Tampa v. Colgan, 121 Fla. 218, 163 So. 577 (cited with approval in Walter v. Schuler, supra), the Supreme Court of Florida declared that:

"By 'fair market value' is meant the amount of money which a purchaser willing but not obligated to buy the property would pay to an owner willing but not obligated to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied. (cases cited) Prospective value alone cannot be made the substantive basis of an assessment, but can be considered to the extent that it enters into, or is reflected in, present value . . . ."

And in McNayr v. Claughton (3rd D.C.A. Fla. 1967), 198 So. 2d 366, the Court held that:

"The terms 'just valuation', 'full cash value' and 'fair market value' are legally synonymous. Tyson v. Lanier, Fla. 1963, 156 So. 2d 833; Peters v. Hansen, Fla. App. 1963, 157 So. 2d 103. To determine the fair market value there are three well recognized guides to appraisal: (1) the cost approach; (2) the comparable sales and (3) the income or economic approach. City of Tampa v. Colgan, 1935, 121 Fla. 218, 163 So. 577, 582. It is apparent that the chancellor selected the income or economic approach as the method for determining fair market value in this case. . . ."

The Florida Tax Assessor's Guide on Real Estate (September 5, 1967), Section 2.3, Pages 28-38, approves and specifies the "Income Approach to Value" for making assessments of real estate used for income producing purposes.

Section 193.021, Florida Statutes, requires that in arriving at a just valuation of taxable property, the tax assessors shall take into consideration certain specified factors, among which is "the income from said property."

The income approach to real estate valuation is a method of estimating value, based on factual data with respect to the income yield of the property. This method is also known as the capitalization approach, because the income derived from the property, generally net annual income, is reduced to an indication of value by a mathematical process or computation known as capitalization, and the income approach to value is a method of measuring the present worth of the benefits to be reaped from the property in the future. Hunter v. Tax Assessor (1966), 27 Fla. Supp. 148. The income or capitalization approach simply is an appraisal technique in which the anticipated net income is processed to indicate the value of the property which produces the income. It is a value estimate derived from considering the relationship of the return of a property will probably earn with the price for which it will probably sell. Theoretically, and many times practically, it is a very sound approach to value. As long as people buy and sell income producing real estate, appraisers following the market will consider it to be entirely economically sound. The evaluation of income property necessarily requires consideration of its return as a factor indicating the present worth or value of such property. This recognized method of appraisal provides a sound technique for ascertaining the fair market value of the subject property, because it involves the factors which most accurately indicate the amount a purchaser, willing but not obligated to buy, would pay to one willing but not obligated to sell. It is apparent that a prospective purchaser would investigate and would be vitally interested in the anticipated income yield of the property, as the sole means of recapturing the purchase price and a return on his capital investment. The value of the property arrived at on economic or income approach would tend to reflect the purchase price which a purchaser willing but not obligated to buy probably would pay to an owner willing but not obligated to sell. Admittedly, the cost approach is not applicable in this instance. The market data or comparable sales approach was utilized as a guide by

defendants' appraisal witnesses, but not by plaintiffs. The evidence of defendants' expert appraisal witnesses appeared more reasonable, logical and convincing. Accordingly, the Court finds for the defendants and against the plaintiffs on the issue of the fair market value of the property involved herein.

On the basis of all the evidence, the Court finds that the lands owned by the defendant subdividers named in the caption of this final judgment have been assessed for the tax years 1962 through 1966, both inclusive, uniformly and equally at just valuation or fair market value. Any increased evaluations of such lands in excess of the existing assessed values would cause the defendant subdividers to bear a disproportionate share of the burden of taxation in relation to other real property. Such a situation would violate the constitutional guaranty of equal protection and equal treatment in the imposition of taxes. In Schooley v. Sunset Realty Corp. (2nd D.C.A. Fla. 1966), 185 So. 2d 1, the Court cited the Supreme Court of the United States in stating this rule of law, as follows:

> "This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of the statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law . . ."

ACCORDINGLY, IT IS ORDERED AND ADJUDGED as follows:

1. This consolidated litigation, and each of the above numbered cases, be and the same are hereby dismissed with prejudice, and that the plaintiffs take nothing by this action and that the defendants go hence without day.

2. That the defendants do have and recover of and from the plaintiff, Vincent H. Conboy, all their costs incurred in this consolidated litigation after the date of the filing of the mandate of the Supreme Court of Florida herein, which costs shall be taxed pursuant to motion and notice, and for which costs, when fixed and taxed, let execution issue.

3. The Comptroller of the State of Florida is dismissed as a party defendant to this consolidated litigation in the same manner as though he had never been named as a party.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 14th day of May, 1968.

/s/ Archie M. Odom
CIRCUIT JUDGE

(CAPTION OMITTED)

COST JUDGMENT

The final judgment rendered on May 14, 1968, in this consolidated cause provides that the defendants have and recover of and from the plaintiff, Vincent H. Conboy, their costs incurred herein after the date of filing of the mandate of the Supreme Court of Florida. It is further provided that such costs shall be taxed pursuant to motion and notice.

This consolidated cause came on to be heard, after due notice, upon the motion of the defendant, Port Royal, Inc., to tax costs in accordance with the provisions of the final judgment. The Court has heard the testimony and evidence, and has considered the affidavit heretofore filed and served, and the Court has had the benefit of arguments of counsel.

The costs under consideration consist of the compensation paid for appraisal services performed by a qualified and experienced M.A.I. Appraiser on behalf of the defendant, Port Royal Inc. This independent real estate appraiser and valuation consultant was engaged to make an appraisal for the purpose of determining the fair market value of the vacant, platted lands remaining unsold as individual lots in the residential subdivision, known as Port Royal, owned by Port Royal, Inc. and involved in this consolidated litigation. The professional services rendered in connection with this consolidated cause included inspections preparation of a written comprehensive appraisal report, and preparation and attendance at a trial as an expert witness. At the trial, this Appraiser duly qualified as an expert witness on the valuation of real estate, and testified on direct and cross-examination. His appraisal report was admitted into evidence.

It appears that fourteen full days were devoted to the performance of such professional appraisal services. The sum of $3,500.00 was charged for the services rendered, which sum has been fully paid by Port Royal, Inc. Said defendant engaged a real estate appraiser upon the advice of counsel.

The Court finds that, by reason of the nature and character of this consolidated litigation and the issues involved, the utilization of the services of a qualified and experienced real estate appraiser and valuation expert was necessary and reasonably required for the proper defense of the multiple claims asserted by plaintiff. The record reflects that the charges made for such professional appraisal services are commensurate with those usually and customarily made by qualified and experienced real estate appraisers for similar services, and that the sum of $3,500.00 is fair and reasonable compensation for the services rendered in this consolidated litigation.

The state law requires that all property subject to taxation shall be assessed at just valuation, which is legally synonymous with fair market value, which is the amount a purchaser willing but not obligated to buy, would pay to one willing but not obligated to sell. Walter v. Schuler (Fla. 1965), 176 So. 2d 81. The principles governing the ascertainment of value for the purpose of taxation are the same as those that control in condemnation cases, which involve the ascertainment of just compensation. Great Northern Railway Company vs. Weeks, 56 S.Ct. 426, 297 U.S. 135, 80 L.Ed. 532.

In condemnation proceedings the allowance of fees of expert real estate appraisal witnesses for the defendant is a matter for the trial judge to decide in the exercise of sound judicial discretion. Dade County v. Brigham (Fla. 1950), 47 So. 2d 602;

Orange State Oil Company v. Jacksonville Expressway Authority (App. 1962), 143 So. 2d 892. In condemnation cases, expert appraisal witnesses usually are allowed compensation on the basis of what is fair and reasonable under all the circumstances, commensurate with the time required, the novelty and difficulty of the questions involved, the skill and experience requisite to properly perform the assignment, and the charges customarily made by qualified real estate appraisers for similar services. It would appear that the same criteria are applicable to tax assessment suits. It was the bringing of this consolidated litigation that precipitated the controversy which made necessary the utilization of the services of an expert real estate appraiser for the ascertainment of the fair market value of the property involved. Where a property owner is compelled to prove the fair market value of his property for tax assessment purposes, it is reasonable for the property owner to meet this obligation by means of qualified expert testimony. If the property owner prevails, he should be entitled to have the reasonable compensation paid this necessary expert witness taxed as costs of the suit, upon purely equitable considerations.

By the enactment of Section 90.231, Florida Statutes, the Legislature determined as a matter of policy that an expert witness testifying in any cause shall be allowed a witness fee including the cost of any exhibits used by such witness (in this instance an appraisal report) in the amount of ten dollars per hour or such amount as the trial judge may deem reasonable, and that the same shall be taxed as costs.

The Supreme Court of Florida has held that reasonable expenses incurred in the production of evidence and exhibits such as photographs, surveys, diagrams and necessary tests and experiments used in the trial may be taxed as costs. Loftin v. Anderson (Fla. 1953), 66 So. 2d 470. A part of the charges made by

defendant's expert witness was attributable to the preparation of an appraisal report used at the trial and admitted in evidence.

The plaintiff argues that it would be inequitable to tax any costs against an individual bringing a taxpayers' class action. The general rule appears to be to the effect that one suing in a representative capacity for the benefit of himself and others may properly be taxed with costs where final judgment is against him. 20 C.J.S., Costs, Sec. 116, Page 358; Gilmour v. North Pasadena Land & Water Co., 178 Cal. 6, 171 P. 1066; Richardson v. Cortner (Miss. 1958), 105 So. 2d 456.

The amount of fees for expert witnesses called to testify and their allowance as costs are matters addressed to the discretion of the Court. Normally, the allowance of an expert witness fee should be determined by the amount of time the witness is required to be in attendance at Court. Common sense dictates that in the allowance of an expert witness fee the Court should include consideration of the time, efforts and expertise devoted by the witness to preparation and attendance. Experience indicates that charges made by an expert witness to the litigant utilizing his services, even though such charges are usual for the expert witness, may not necessarily be the basis of taxable costs unless deemed reasonable by the Court. Florida Civil Trial Practice Manual, Sec. 21.9, Page 404.

IT IS THEREUPON ORDER AND ADJUDGED that said motion to tax costs is hereby granted, and that the defendant, PORT ROYAL, INC., a Florida corporation, do have and recover of and from the plaintiff, VINCENT H. CONBOY, the sum of $3,500.00, as costs, for which sum let execution issue.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 17th day of July, 1968.

/s/ Archie M. Odom
CIRCUIT JUDGE

IN THE DISTRICT COURT OF APPEAL OF FLORIDA – SECOND DISTRICT JANUARY TERM, A.D. 1970 CASE NO. 69-170

Opinion filed January 14, 1970

(BALANCE OF CAPTION OMITTED)

PER CURIAM.

The opinion of the trial court is affirmed. In regard to the cost judgment, costs are taxable to the appellant at the discretion of the trial judge. See 8 Fla. Jur., Cost § 8, p. 9.

Section 90.231(2), Florida Statutes, 1967, states that:

> "Any expert or skilled witness who shall have testified in any cause shall be allowed a witness fee including the cost of any exhibits used by such witness in the amount of ten dollars per hour or such amount as the trial judge may deem reasonable, and the same shall be taxed as costs."

It does not state that the cost of time for preparation of the expert witness's opinion is not includable in the costs.

Affirmed.

LILES, A.C.J., and PIERCE and MANN, JJ., CONCUR.